No. 02-1748

In The

Supreme Court of the United States

CHRYSLER CORPORATION,

Petitioner,

v.

DOROTHY CLARK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

RICHARD HAY
203 West Columbia Street
P.O. Box 1124
Somerset, KY 42502-1124
(606) 679-2214

Counsel of Record for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Chrysler Corporation presents two questions for review:

1. Whether, in diversity jurisdiction cases, the Sixth Circuit's practice of applying the forum state's sufficiency-of-the-evidence standard should be prohibited; and,

2. Whether the $3 million punitive damages award was unconstitutionally excessive.

Although Supreme Court Rule 14 states that the questions presented for review shall be "expressed concisely in relation to the circumstances of the cases," Chrysler neglects to advise the Court that neither question was preserved for review.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
The Product	3
The Defect	3
The Federal Motor Vehicle Safety Standards	5
The Accident	7
The Seatbelt Evidence	9
Summary	10
REASONS FOR DENYING THE PETITION	11
I. CERTIORARI IS UNWARRANTED BECAUSE THE PROPER SUFFICIENCY-OF-THE-EVIDENCE STANDARD WAS APPLIED, AND THIS ISSUE WAS NOT PRESERVED FOR REVIEW	11
A. Chrysler Did Not Preserve This Issue For Review	11
B. If There Was An Improper Conflict Among The Circuits, It Was Resolved by *Gasperini v. Center For Humanities, Inc.*	13
C. The Jury's Finding Of Gross Negligence Is Supported By Substantial Evidence	18
II. CERTIORARI IS UNWARRANTED BECAUSE THE $3 MILLION PUNITIVE DAMAGES AWARD IS NOT UNCONSTITUTIONALLY EXCESSIVE, AND THIS ISSUE WAS NOT PRESERVED FOR REVIEW	19

TABLE OF CONTENTS – Continued

Page

A. The Unconstitutionally Excessive Claim Was Not Preserved For Review 19

B. The $3 Million Punitive Damages Award Is Not Unconstitutionally Excessive..... 23

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Adams v. Davis, 578 S.W.2d 899 (Ky. 1979) 24

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 13, 20, 25

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) ..... *passim*

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 17, 21, 25

Cooper Industries v. Leatherman Tool Group, 532 U.S. 424 (2001) 17, 27

Dick v. New York Life Ins. Co., 359 U.S. 437 (1959) 12, 13

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) ... 11, 13, 14

Ford Motor Co. v. Romo, 99 Cal. App. 4th 1115 (2002), GVR issued May 19, 2003 (U.S. No. 02-1097) 29

Ford Motor Co. v. Smith, 83 S.W.3d 483 (Ky. 2002), GVR issued May 19, 2003 (U.S. No. 02-1096) 29

Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) 14, 15, 16, 17, 18

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 13, 14

Hanna v. Plumer, 380 U.S. 460 (1965) 14

Humana of Kentucky, Inc. v. McKee, 834 S.W.2d 711 (Ky. Ct. App. 1992) 16

K & T Enterprises v. Zurich Insurance, 97 F.3d 171 (6th Cir. 1996) 11, 13

Lewis v. Bledsoe Surface Min. Co., 798 S.W.2d 459 (Ky. 1990) 16

TABLE OF AUTHORITIES – Continued

Page

Lovas v. General Motors Corp., 212 F.2d 805 (6th Cir. 1954) 11, 13

Mercer v. Theriot, 377 U.S. 152 (1964) 12, 13, 18

Morales v. American Honda Motor Co., 151 F.3d 500 (6th Cir. 1998) 12

Neeley v. Eby Construction Co., 386 U.S. 317 (1967) .. 13, 21

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 21, 25, 26, 28

Smith v. Ford, 83 S.W.3d 483 (Ky. 2002) 16

State Farm Mutual Automobile Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003) 27, 28, 30

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) 21, 26

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 14, 15

Wemyss v. Coleman, 729 S.W.2d 174 (Ky. 1987) 10

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. VII 17

STATUTES AND REGULATIONS

49 U.S.C. §30103(e) 7

KRS §189.125(6) 10

KRS §360.040 29

49 C.F.R. §571.206 5

TABLE OF AUTHORITIES – Continued

Page

RULES

Cal. Code Civ. P. §685.010(1) 29

Fed. R. Civ. P. 50 ..... 12, 14, 15, 17

Fed. R. Civ. P. 59 ..... 14, 15, 23

Sup. Ct. R. 14.4 23

OTHER AUTHORITIES

39 Fed. Reg. 29,198 (Aug. 14, 1974) 5

53 Fed. Reg. 31,716 (Aug. 19, 1988) 6

61 Fed. Reg. 145 (Jan. 3, 1996) 6

www.federalreserve.gov/releases/H15/data/WF/temly.txt 30

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent, Dorothy Clark, individually and as Administratrix of the Estate of Charles Clark ("Clark"), respectfully objects to Chrysler Corporation's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

COUNTERSTATEMENT OF THE CASE

A unanimous federal court jury found that Chrysler's 1992 Dodge Ram pickup truck was defective and unreasonably dangerous, that Chrysler failed to exercise ordinary care in its design, testing, manufacturing and marketing of the pickup truck, and that Chrysler's conduct was a substantial factor in causing Mr. Clark's injuries and death. 3 Tr. 182-183, 187-188. Chrysler never contested the jury's findings that its truck was defective and unreasonably dangerous, or that its conduct was negligent.

The jury assessed compensatory damages of $471,258.26. As the jury apportioned fifty percent fault to Mr. Clark, the District Court reduced the compensatory verdict to $235,629.13.

The jury also found that Chrysler's conduct constituted gross negligence,[1] and awarded $3 million in punitive damages. Although Chrysler now claims the punitive damages award is excessive and violative of due process, Chrysler fails to advise this Court that it did not raise its unconstitutionally excessive claim, or even a common law

[1] Gross negligence was defined in the jury instructions as "reckless disregard for the lives and safety of other persons, including Charles Clark." 3 Tr. 180.

excessiveness claim, in the District Court or on appeal to the Sixth Circuit. *See* the arguments raised by Chrysler in its motion for a new trial at Respondent's Appendix ("Res. App.") 1a; the arguments raised by Chrysler in its renewed motion for a judgment as a matter of law at Res. App. 2a; and, the arguments raised by Chrysler in its appellant's brief to the Sixth Circuit at Res. App. 3a. None of Chrysler's arguments challenged the size of the punitive damages award in any shape, form or fashion.

Chrysler first raised the issue of unconstitutionally excessive punitive damages in its petition for rehearing to the Sixth Circuit, which the Court denied. Petitioner's Appendix ("Pet. App.") 47a.

As with its unconstitutionally excessive claim, Chrysler did not preserve for review the issue of whether the District Court and Sixth Circuit erred in applying the state sufficiency-of-the-evidence standard. Again, Chrysler first pressed this issue in its Petition for Rehearing to the Sixth Circuit.[2]

Chrysler's failure to preserve for review the two issues it now raises, and the lack of a developed record on these issues, make certiorari unwarranted.

---

[2] Chrysler did not object to the District Court's utilization of the state sufficiency-of-the-evidence standard. In its appellant's brief to the Sixth Circuit, Chrysler, in setting out the standard of review, stated: "In diversity cases, this Court has held that the law of the forum state provides the standard of review regarding the sufficiency of the evidence." *Id.*, at 16 (citation omitted). Chrysler did, in a footnote, state that a majority of the Circuits applied a federal standard when judging the sufficiency-of-the-evidence in a motion for judgment as a matter of law, but failed to argue that the District Court erred in applying the state standard and failed to press the Sixth Circuit to apply anything other than the state standard.

The Product

The product in question was a 1992 Dodge Ram pickup truck, which Charles Clark purchased new less than two years before the October, 1993 accident. At issue was the door latch system: more particularly, the relationship between the door latch and the door latch striker (what the latch grasps), which is affixed to the truck's B-pillar. The pickup truck, like most automobiles, had A, B and C-pillars. The pillars provide the structural support for a vehicle, "like the studs of a house," 2 Tr. 134, and play a crucial role in vehicle safety.

The B-pillar, to which the door latch striker is affixed,[3] should provide structural support so as to maintain the connection between the door latch and door latch striker during an accident. A pillar should be designed so that it doesn't "twist out" in an accident. If the B-pillar twists out, then the door latch striker also twists (horizontal rotation), which can cause the door latch striker to by-pass the grasping mechanism of the door latch (ratchet and pawl), thus opening the door. 1 Tr. 101.

The Defect

Whether an A, B or C-pillar, a pillar is generally recognized in the automotive industry to be a "boxed-in section of metal."[4] 2 Tr. 94 (testimony of Chrysler's Vehicle

---

[3] The Dodge Ram pickup, like all two-door passenger vehicles, has the door latch striker affixed to the B-pillar. In four-door vehicles, the front door latch striker is affixed to the B-pillar and the rear door latch striker is affixed to the C-pillar.

[4] The jury saw B-pillars from contemporaneous pickup trucks manufactured by General Motors, Ford, Nissan and Toyota. These pillars were boxed and contained internal structural supports.

(Continued on following page)

Safety Specialist). However, the B-pillar in the Dodge Ram pickup truck, **unlike any other B-pillar in any other passenger vehicle manufactured in modern times**, was not boxed and had no structural support where the door latch striker was affixed. 2 Tr. 148. The so-called B-pillar was nothing more than a pane of easily-bendable sheet metal, 44 one-thousandths (0.044) of an inch thick. Plaintiff's Trial Exhibit ("Plf. Ex.") 24. Even Chrysler's Vehicle Safety Specialist acknowledged that a flat, unboxed piece of sheet metal does not constitute a door pillar and would be "weak in most every direction." 2 Tr. 94.

The flimsy piece of sheet metal that served as the Dodge Ram B-pillar "twisted out" in the accident, not from the impact with the other vehicle, but from Mr. Clark's body striking the interior door panel. The twisting B-pillar caused the door latch striker to horizontally rotate, bypass the latching components of the door latch, and open Mr. Clark's door. 1 Tr. 101-105.

Photographs of an exemplar B-pillar from a General Motors pickup truck, which demonstrate the boxing and added internal structure normally found in door pillars, are located at Res. App. 5a. Post-accident photographs of Mr. Clark's truck, showing the extensive B-pillar twist out and horizontal rotation of the door latch striker, are located at Res. App. 6a. (B-pillar twist out is obvious; the door latch striker, which should be "pointing" forward, has horizontally rotated 46 degrees and likely rotated more during the accident, but "recovered somewhat" due to the "springiness" of the B-pillar. 1 Tr. 95.)

Photographs of these B-pillars were introduced as Plaintiff's Trial Exhibit 29.

The Federal Motor Vehicle Safety Standards

Chrysler's Petition focuses on the door latch, which admittedly complied with the federal door latch standard,[5] but ignores the fact that the focus at trial was on the B-pillar defect. In fact, the District Court ruled in response to Chrysler's argument that there was insufficient evidence to support the punitive damages award that the evidence presented by Clark's B-pillar expert "was sufficient to support an instruction on punitive damages and the jury's ultimate conclusion that Chrysler was grossly negligent." Pet. App. 44a. Chrysler attempts to focus the Court's attention away from the B-pillar defect because there is no federal safety standard for B-pillars.

Furthermore, Chrysler's compliance with Standard 206 was meaningless in the context of this case. Standard 206 is a hardware test, not a performance standard. In a Standard 206 test, a sample door latch and a sample door latch striker are mounted to a rigid, steel test fixture, and then loaded in a purely longitudinal and purely latitudinal fashion. Standard 206 does not test door latch strength in a vehicle setting, and does not indicate how the latch will perform in an accident. 1 Tr. 107-109. Although the National Highway Traffic Safety Administration ("NHTSA") was obviously aware of the different results one might obtain from testing the door latch and striker while mounted to a rigid test fixture as opposed to the door and door pillar of a vehicle, it counted on the vehicle's door pillar to be "strengthened by being formed into its required door post configuration." 39 Fed. Reg. 29,198 (Aug. 14,

[5] 49 CFR §571.206. Standard 206, the door latch standard, was one of the original motor vehicle safety standards that became effective in 1967. Standard 206 adopted the existing Society of Automotive Engineers' fixture test procedure. 1 Tr. 107.

1974), Plf. Ex. 14. As the unboxed pane of sheet metal on the Dodge Ram demonstrated, Chrysler ignored the "required door post configuration" expected, but not mandated, by NHTSA. 2 Tr. 93-94 (Chrysler's Vehicle Safety Specialist acknowledging that there is no Federal Motor Vehicle Safety Standard regarding door pillars).

In 1988, NHTSA proposed an upgrade of safety standards pertaining to ejections and side impacts, including Standard 206. 53 Fed. Reg. 31,716 (Aug. 19, 1988), Plf. Ex. 33. NHTSA stated that one of the reasons for its proposed change was that the Standard 206 test "may not adequately represent twisting and bending forces at work during a severe side impact." *Id.,* at 31,718. Chrysler filed an objection to NHTSA's proposal to change Standard 206, boldly proclaiming: "It is neither possible nor correct to attempt to directly relate door latch performance to ejection potential." Plf. Ex. 34. Chrysler's objection to the proposed rule change was dated October 14, 1988, five years to the day before Mr. Clark's death. *Ibid.* Contrary to Chrysler's misrepresentation to the Court, NHTSA's 1988 proposal to amend Standard 206 is still pending.[6]

Although Chrysler performed no in-vehicle test and no test that took into account the "twisting and bending forces at work in a side impact," such a test was readily

---

[6] Chrysler wrongly represents to the Court that "following a close study and investigation, NHTSA concluded that [its proposed modifications to Standard 206] were unnecessary and *declined* to make the changes. . . . " Pet. at 17. Chrysler cites the Court to 61 Fed. Reg. 145, 147 (Jan. 3, 1996) as authority for its misrepresentation, which is a NHTSA proposal "to establish an average fuel economy standard for light trucks," and briefly mentions the still pending proposed modifications to Standard 206 in the context that the proposed change, if adopted, would not add a "weight penalty" that would affect gas mileage ratings.

available. General Motors had developed a test called the "horizontal rotation test," to test for door latch striker twist out. Plf. Ex. 16. GM made its horizontal rotation test available to Chrysler in 1987.[7] 2 Tr. 90. Chrysler never bothered to utilize the GM horizontal rotation test, or anything like it.[8] *Ibid.*

Finally, Chrysler is well aware that "[c]ompliance with any Federal motor vehicle safety standard issued . . . does not exempt any person from any liability under common law." 49 U.S.C. §30103(e). Chrysler's repeated arguments that punitive damages are inappropriate because its door latch exceeded Standard 206 test fixture requirements do not withstand close scrutiny.

The Accident

The accident occurred at an intersection near Gray, Kentucky. According to passenger Billy Clark, after Mr. Clark stopped for the stop sign, passenger Freddie Clark said "it was clear." 2 Tr. 27. Freddie Clark testified that he had said it was clear "my way." 2 Tr. 30. Mr. Clark entered the intersection, intending to make a left turn, but was hit by the oncoming Kentucky State Police cruiser. There was no testimony that Mr. Clark "suddenly sped out into the intersection," Pet. at 3, as Chrysler argues.[9] Trooper Alfred

---

[7] GM made the horizontal rotation test available to Chrysler due to their mutual membership in the Motor Vehicle Manufacturers Association and their agreement to share safety related developments. 2 Tr. 90.

[8] Chrysler's designated door latch representative testified that the Door Hardware Group did not test for B-pillar twist out, as the Structural Group would do this. 2 Tr. 73. Chrysler's designated vehicle structures representative testified that the Structural Group performed no such tests. R.E. 97 at 63.

[9] Chrysler states that Mr. Clark told a State Trooper that he had seen the approaching cruiser, but "thought he could beat him." Pet. at 3.

(Continued on following page)

Barnett was driving the Kentucky State Police cruiser. Officer Barnett testified he was traveling at or near the 55 miles per hour speed limit when he saw Mr. Clark pulling into the intersection. Officer Barnett hit his brakes and steered to his left in an attempt to avoid hitting Mr. Clark's truck. Officer Barnett testified that: "My right front fender struck the pickup truck's left front fender . . . a glancing blow." 2 Tr. 36. The investigating officer, Gary Martin, also testified that: "It was a glancing blow, it wasn't a direct 90 degree blow at all." 2 Tr. 45.

Because Trooper Barnett had steered to the left before impact and struck the Clark vehicle a glancing blow, the police cruiser "side-slapped" the Clark truck, then continued in its direction of travel until it ran off the highway and struck a dirt embankment. 2 Tr. 38, 49. There was no testimony that the "collision hurled Officer Barnett's cruiser 150 feet across the highway," Pet. at 4, as Chrysler represents to this Court.[10]

Clark's accident reconstructionist testified that the glancing impact resulted in a change in velocity to Mr.

The trial court allowed Chrysler to introduce this hearsay testimony over Clark's objection. 2 Tr. 57-60. No witness, including the investigating officer who prepared the accident report, testified at trial that they heard Mr. Clark make this statement.

[10] Chrysler also claims the crash "was so loud that a group of fifteen or twenty construction workers in a store nearby heard the impact over the sounds of *their power saws*. . . . " Pet. at 4 (emphasis added). Mack Martin was the only construction worker who testified in the case. He and others were building a store ("we hadn't even put the windows in it" 2 Tr. 14) near the accident scene. He testified he heard the accident over the sound of the Skil saw he was using. 2 Tr. 17-18. There was no testimony of any other power saw being used. Although the significance of the loudness of the collision or the number of power saws being used escapes Clark, this is yet another example of Chrysler's exaggeration of the evidence.

Clark's truck of "approximately 15 miles per hour." 2 Tr. 125. Chrysler continues to ignore the accident reconstruction testimony, and continues its exaggerated portrayal of the accident as a horrendous impact where death would be expected.

The moderate nature of the accident is demonstrated by the lack of serious injury to the other occupants, who were not ejected. Billy Clark was not hurt, but was taken to the E.R., given Tylenol and sent home with no additional problems, 2 Tr. 24; Freddie Clark testified that "it stoved up my neck a little bit, but it didn't hurt me [that bad]," with no indication of any medical care ever being required, 2 Tr. 32; and, Officer Barnett testified he received "about a three inch laceration" to his right forearm, with no testimony of any medical care being required. 2 Tr. 36-37. Chrysler's statement to the Court that Billy Clark, Freddie Clark and Officer Barnett "were injured but survived," Pet. at 4, is yet another example of Chrysler's mischaracterization of the evidence.

The undisputed testimony was that Mr. Clark's door opened during the accident and he was ejected from the vehicle. The evidence suggests that Mr. Clark's body was between the open door and door frame when the two vehicles "side-slapped," which would explain the crushing injury to his chest. 2 Tr. 171, 3 Tr. 33. Mr. Clark died due to "blunt force trauma to [his] thorax." Plf. Ex. 4. Mr. Clark died because his vehicle had a defective door latch system, not because of the initial impact.

The Seatbelt Evidence

It was undisputed that neither Mr. Clark nor his nephews, Freddie and Billy, were wearing their seatbelts.

However, the accident occurred nearly 10 years ago, and before Kentucky adopted its mandatory seatbelt law.[11] Chrysler knew when it designed the Dodge Ram pickup truck that it had the lowest seatbelt use rate of the "Big Three," with 37% belt use nationwide, and only 23% belt use in states, such as Kentucky, without a mandatory seatbelt law. Plf. Ex. 30.

Expert testimony showed that even if Mr. Clark had been seatbelted, he would have, at least, been partially ejected when the door opened, with his body between the open door and the door frame when the two vehicles "side-slapped," and thus crushed between the two vehicles. 2 Tr. 130-131.

The jury also heard testimony from Perry Goode of Junction City, Kentucky. Mr. Goode, driving his 1991 Dodge Ram pickup truck (same door latch and B-pillar as Mr. Clark's 1992 model), entered an intersection near Danville, Kentucky, when the driver of a Mustang ran a red light and struck the left front fender of his truck. Mr. Goode was thrown against the interior of the driver's door, the door opened, and he was ejected from his truck and seriously injured – even though he was wearing his seatbelt. 2 Tr. 104-105.

Summary

Chrysler received a fair trial, but lost because its door latch system, particularly the B-pillars, was so badly

---

[11] KRS §189.125(6), effective July 15, 1994. Although the mandatory seatbelt law was not in effect at the time of the accident, the jury was instructed that Mr. Clark had the duty to exercise ordinary care, and Chrysler was properly allowed to argue that this included the duty to wear a seatbelt. *See Wemyss v. Coleman*, 729 S.W.2d 174, 179 (Ky. 1987).

designed. The jury obviously understood that the only reason for omitting three sides of what should have been a four-sided B-pillar, and omitting the internal structural support, was to save a few dollars. Chrysler's outrageous design choice, coupled with its knowledge that a person ejected from a vehicle has as much as a 4,000% increased risk of death over a non-ejected occupant, 1 Tr. 124, warranted the jury's finding of gross negligence. The $3 million punitive damages award was supported by the evidence, and certainly is not constitutionally excessive.

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS UNWARRANTED BECAUSE THE PROPER SUFFICIENCY-OF-THE-EVIDENCE STANDARD WAS APPLIED, AND THIS ISSUE WAS NOT PRESERVED FOR REVIEW

Chrysler claims the wrong standard of evidentiary review was applied, which affected the outcome of this case. Not only is Chrysler's argument contrary to the evidence, Chrysler did not raise this issue in the District Court, or press the issue in the Sixth Circuit.

A. Chrysler Did Not Preserve This Issue For Review

The Sixth Circuit has long held that the sufficiency-of-the-evidence standard to be applied in diversity cases is that "of the state whose substantive law governs."[12] Pet. App. 24a (citation omitted). Chrysler made the routine

[12] In *K & T Enterprises v. Zurich Insurance*, 97 F.3d 171, 176 (6th Cir. 1996), the Court traced its rule back to *Lovas v. General Motors Corp.*, 212 F.2d 805, 807 (6th Cir. 1954), and stated "[t]he *Lovas* rule is based on *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 . . . (1938). . . ."

motions for judgment as a matter of law, which the District Court overruled. In none of its Rule 50 motions did Chrysler claim the District Court should use any standard of review other than the Kentucky standard.[13] Had Chrysler timely raised this issue, the District Court might easily have concluded, like this Court did when faced with the same issue in *Mercer v. Theriot,* 377 U.S. 152 (1964), that "[t]he evidence was sufficient under any standard which might be appropriate – state or federal." *Id.*, at 156 (citing *Dick v. New York Life Ins. Co.,* 359 U.S. 437, 444-445 (1959)) ("A decision as to which standard [state or federal] should be applied can well be left to another case where the question is briefed and argued.").

As Chrysler failed to raise this issue in the District Court, the issue was not briefed, and the trial court made no ruling on the issue. Similarly, there is no ruling from the Sixth Circuit on this issue, as Chrysler never pressed this issue until its Petition for Rehearing to the Sixth Circuit – which was denied.

In its appellant's brief, at 16, Chrysler specifically advised the Sixth Circuit that: "In diversity cases, this Court has held that the law of the forum state provides the standard of review regarding the legal sufficiency of the evidence. *Morales v. American Honda Motor Co.,* 151 F.3d 500, 506 (6th Cir. 1998)." Chrysler did add a footnote, mentioning that a "majority of the Circuits hold that federal standards should be applied," but that Chrysler should prevail "[r]egardless of which standard is applied." Brief, at 16, n.3. Chrysler's mere mention, in a footnote, of other circuits applying "federal standards," without setting

[13] Fed. R. Civ. P. 50(a)(2) requires that motions for judgment as a matter of law "shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."

forth the other circuits, the supporting cases or the standards applied, or otherwise pressing the issues, does not preserve this question for review. This is especially true where, as here, the issue had not been preserved in the trial court for review by the Sixth Circuit, and the Sixth Circuit did not render an opinion on the issue.

Chrysler claims that it preserved the issue for review by raising it in its Petition for Rehearing in the Sixth Circuit (which was denied), on the grounds that neither the District Court nor the panel deciding the case had the authority to overrule a prior precedential holding. Pet. at 8, n.2. This argument is contrary to *Mercer* and *Dick*, and ignores the rationale behind the preservation of error rule.

There is "no cause for deviating from [this Court's] normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review . . . ." *Neeley v. Eby Construction Co.,* 386 U.S. 317, 330 (1967). Chrysler's failure to preserve this issue for review and the lack of a "well-developed record and a reasoned opinion on the merits," *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 80 (1988), are reason enough to deny certiorari.

B. If There Was An Improper Conflict Among The Circuits, It Was Resolved By *Gasperini v. Center for Humanities, Inc.*

The Sixth Circuit's approach, in diversity jurisdiction cases, of reviewing the sufficiency of the evidence "under the law of the state whose substantive law governs," Pet. App. 24a (citation omitted), "is based on *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938)." *K & T Enterprises v. Zurich Insurance,* 97 F.3d 171, 176 (6th Cir. 1996), *Lovas v. General Motors Corp.,* 212 F.2d 805, 807 (6th Cir. 1954). The Sixth Circuit's approach meets the "outcome-determination" test of *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945), when

read with reference to the "twin aims" of *Erie*: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 747 (1980) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

Any conflict among the Circuits regarding which sufficiency-of-the-evidence standard to apply in diversity cases has been resolved by this Court's opinion in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). *Gasperini* was a diversity jurisdiction case tried in New York, the home state of the defendant, Center for Humanities. At issue was whether the jury's compensatory damages award should be reviewed for excessiveness under the relaxed federal standard ("shocks the conscience" of the court) or the stricter state standard ("deviates materially" from what would be reasonable compensation). *Id.*, at 422-425.

This Court, applying the choice of law analysis of *Erie*, *Guaranty Trust* and *Hanna*, found that the twin aims of *Erie* precluded application of the federal standard of review by the District Court, as it would create "substantial variations between state and federal" judgments. *Gasperini*, at 430 (quoting *Hanna*, at 467-468).

Chrysler's argument that application of the federal standard would change the outcome here, if true, is an admission that its choice of law scheme would violate *Guaranty Trust-Hanna's* outcome-determination test, promote forum shopping and create inequitable administration of the laws. Chrysler seeks too much here.

Although *Gasperini* involved a Rule 59 standard of review and this case involves a Rule 50 standard of review, this is a distinction without a difference. Chrysler claims

that Rule 50, like Gasperini claimed with respect to Rule 59, "incorporates its own standard of evidentiary sufficiency. . . . "[14] Pet. at 13. Chrysler points to Rule 50(a)'s language that permits judgment as a matter of law when "there is no legally sufficient basis for a reasonable jury to find for that party." It is apparent that Chrysler's argument is misplaced when it identifies the quantum of proof needed to survive a Rule 50 motion as "substantial evidence from which the jury could find in favor of the party against whom the motion is made." Pet. at 15. The fact that the words "substantial evidence" do not appear in Rule 50 shows that Rule 50 does not provide *the* standard, or even *a* standard, for ruling upon motions for judgment as a matter of law. Like the Court found in *Gasperini,* the federal procedural rule is not in "direct conflict" with the state rule, *id.,* at 427, n.7 (citing *Walker v. Armco Steel Corp., id.*) and does not establish a standard of review. *Gasperini,* at 437-438, n.22.

Chrysler cites *Gasperini* for the proposition that it would be improper to apply the state standard of review, Pet. at 13, which is a blatant misrepresentation of the Court's holding. As counsel of record for Chrysler was counsel for the Center of Humanities in *Gasperini*, there should be no confusion over the fact that the Center for Humanities *won* its argument that the more restrictive New York standard, not the federal standard, should govern the District Court's excessiveness review of the

[14] Fed. R. Civ. P. 59(a) provides for a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."

jury's compensatory damages award to Mr. Gasperini.[15] *Gasperini,* at 419.

Not only does Chrysler misstate the holding in *Gasperini,* it attempts to blur the distinction between the standard of review to be applied by the federal trial court judge and the standard of review to be applied on appeal.[16] After holding that the state standard governed the District Court's review of "compensation awards for excessiveness or inadequacy," *id.,* at 419, this Court went on to find that

---

[15] In its brief on the merits to this Court, the Center for Humanities argued that: "Basic Erie [p]rinciples . . . [r]equire [a]pplication [o]f [s]tate-law [e]xcessiveness [s]tandards [i]n [d]iversity [a]ctions"; "[s]tandards of excessiveness . . . are matters of state, and not federal common law"; "the role of the district court is to determine whether the jury's verdict is within the confines set by state law"; "[s]tate law excessiveness standards must be applied by the district court pursuant to Erie"; and, "[t]he legal regime [*Gasperini*] and his amici seek to impose would disregard state law and Erie" and lead to different results than would be had in "a state court a block away." Brief for Respondent, *Gasperini v. Center for Humanities, Inc., id.,* at 43-47 (No. 95-719) (internal quotations and citations omitted). Although the Center for the Humanities' arguments concerned the proper standard of review for the jury's award of compensatory damages, the same arguments apply to the standard of review for the jury's finding of gross negligence. The Court in *Gasperini* accepted the Center's arguments, and held that the state standard of review was to be applied by the District Court.

[16] Chrysler also mixes and matches the standards of review applied by Kentucky trial courts and appellate courts. Chrysler cites *Smith v. Ford,* 83 S.W.3d 483 (Ky. 2002), for the proposition that the state standard allows a verdict to be set aside only "when it is 'palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice.'" Pet. at 14. This is the Kentucky standard to be applied on appellate review, not the trial court standard. See *Smith,* at 490. ("Upon completion of such an evidentiary review, the Appellate Court must determine whether the verdict rendered is 'palpably or flagrantly against the evidence. . . . '") (quoting *Lewis v. Bledsoe Surface Min. Co.,* 798 S.W.2d 459, 461 (Ky. 1990)), *and see Humana of Kentucky, Inc. v. McKee,* 834 S.W.2d 711, 718 (Ky. Ct. App. 1992) (same).

the standard of appellate review for a district court's denial of a motion for a new trial for excessive or inadequate damages, which is controlled by federal law, could be no more restrictive than "abuse of discretion" due to Seventh Amendment constraints.[17] *Id.*, at 438.

Based on *Gasperini*, the District Court correctly applied the Kentucky standard when ruling on Chrysler's Rule 50 motions. Based on *Gasperini*, the only error committed by the Sixth Circuit was its *de novo* review of the District Court's denial of Chrysler's Rule 50 motions, as appellate review stricter than an abuse of discretion standard violates the Re-Examination Clause of the Seventh Amendment.[18] The Sixth Circuit's *de novo* review of the evidentiary sufficiency for the jury's finding of gross negligence, to which Clark failed to object, only benefited Chrysler.

Chrysler argues that the District Court and Sixth Circuit should have reviewed the trial evidence under a federal substantial evidence standard. Such a review would violate both prongs of *Gasperini*: the requirement

---

[17] The Court was concerned with the Seventh Amendment's Re-Examination Clause, which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., amend. VII.

[18] In *Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424 (2001), this Court stated that "the role of the trial judge is 'to determine whether the jury's verdict is within the confines set by state law. . . .'" *id.*, at 433 (quoting *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)), but that appellate review of the *size* of a punitive damages award should be *de novo* as the "level of punitive damages is not really a 'fact' 'tried' by the jury." *Id.*, at 437 (quoting *Gasperini*, 518 U.S. at 459) (Scalia, J., dissenting). But here, the issue is whether the evidence supported the jury's finding of gross negligence, which is a finding of fact, so appellate review is subject to Seventh Amendment constraints. *Gasperini*, at 435-436.

that the federal trial court apply the state standard of review and the requirement that the appellate court review only for an abuse of the trial court's discretion. Chrysler wants this Court to order a re-examination of the jury's factual finding of gross negligence, which is neither appropriate, nor grounds for granting certiorari.

A grant of certiorari here would serve no purpose. The state vs. federal issue was not preserved for review, there is no District Court or Sixth Circuit ruling or opinion on this issue, and the issue, as well as any conflict among the Circuits, was resolved by the Court's decision in *Gasperini v. Center for Humanities, Inc.*

C. The Jury's Finding Of Gross Negligence Is Supported By Substantial Evidence.

Although Chrysler failed to preserve this issue and the District Court properly applied the state sufficiency-of-the-evidence standard, a review of the evidence under Chrysler's "substantial evidence" standard would not change the outcome here. Clark, in her Counterstatement of the Case, has set out some of the substantial, if not overwhelming, evidence which supports the jury's factual finding that "the conduct of Chrysler Corporation in designing, manufacturing or marketing the 1992 Dodge Ram pickup truck constituted gross negligence." 3 Tr. 180.

This is yet another reason why certiorari is not appropriate. *Mercer,* 377 U.S., at 156. (Court refused to consider federal vs. state sufficiency-of-the-evidence standard issue, as "evidence was sufficient under any standard which might be appropriate . . . .")

II. CERTIORARI IS UNWARRANTED BECAUSE THE $3 MILLION PUNITIVE DAMAGES AWARD IS NOT UNCONSTITUTIONALLY EXCESSIVE, AND THIS ISSUE WAS NOT PRESERVED FOR REVIEW

Chrysler claims the $3 million punitive damages award was unconstitutionally excessive, and argues that "at a minimum, a GVR is warranted for further consideration . . . in light of *State Farm [v. Campbell].*" Pet. at 18. Not only was the punitive damages award warranted, and not unconstitutionally excessive, Chrysler never raised or briefed this excessiveness issue until its Petition for Rehearing to the Sixth Circuit.

A. The Unconstitutionally Excessive Claim Was Not Preserved For Review

Following the jury verdict and entry of the District Court's judgment, Chrysler filed a motion for a new trial, R.E. 151, and a renewed motion for judgment as a matter of law. R.E. 152. Although Chrysler challenged the sufficiency of the evidence to support Clark's entitlement to a punitive damages instruction and verdict, neither of Chrysler's post-judgment motions challenged the size of the punitive damages award. There was no common law claim that the punitive damages award was excessive or the result of passion or prejudice. There was no request for remittitur. There was no claim that the award was unconstitutionally excessive.[19] A review of Chrysler's post-judgment motions

[19] The argument headings showing the basis for Chrysler's motion for a new trial are listed at Res. App. 1a. The argument headings showing the basis for Chrysler's renewed motion for judgment as a matter of law are listed at Res. App. 2a. No issue was raised regarding the size of the punitive damages award.

will not reveal the words "excessive," "unconstitutional," "Fifth Amendment," "Fourteenth Amendment," "Due Process Clause," "due process," or "remittitur," or the excessiveness guideposts articulated in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), "degree of reprehensibility," "ratio" or "sanctions for comparable misconduct."[20]

Following the District Court's denial of its post-judgment motions, Pet. App. 40a, Chrysler appealed to the United States Court of Appeals for the Sixth Circuit. Chrysler pressed four arguments. The argument headings in Chrysler's brief to the Sixth Circuit are listed at Res. App. 3a-4a. Chrysler made no claim that the size of the punitive damages award was excessive. Chrysler first raised the issue of excessive damages in its Petition for Rehearing in the Sixth Circuit – which was denied. Pet. App. 47a.

In *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), the appellant focused its efforts on challenging a $1.6 million punitive damages award, contending the award violated the Excessive Fines Clause, Due Process Clause and Contract Clause of the U.S. Constitution. *Id.*, at 76. Appellant claimed it had preserved these issues by raising them in its petition for rehearing before the Mississippi Supreme Court *Id.,* at 77. This Court concluded that appellant's "challenge . . . to the size of the punitive damages award . . . was not properly raised below." *Id.,* at 78. This Court reasoned that "any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits." *Id.,* at 80.

---

[20] *Gore* was decided May 20, 1996. The *Clark v. Chrysler* trial began October 29, 1997.

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), this Court held that the Excessive Fines Clause of the Eighth Amendment did not apply to punitive damages awards in cases between private parties. Although Browning-Ferris Industries had moved the District Court for judgment notwithstanding the verdict and new trial and remittitur regarding the punitive damages award, pressed the issue on appeal to the United States Court of Appeals for the Second Circuit and even though the Court granted *certiorari* on the punitive damages issue, *id.*, at 262, this Court refused to determine whether the punitive damages award was excessive under the Due Process Clause of the Fourteenth Amendment, because Browning-Ferris Industries had failed to raise its due process argument in the District Court or the Court of Appeals.[21] *Id.*, at 277.

Chrysler has not preserved for review the question of whether the $3 million punitive damages award was unconstitutionally excessive. There is "no cause for deviating from [this Court's] normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here." *Neeley v. Eby Construction Co.*, 386 U.S. 317, 330 (1967).

Chrysler claims its *Gore* challenge "was both 'pressed' and 'passed upon' by the Court below." Pet. at 19, n.7. As

---

[21] *And see Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 9 (1991) (Court, discussing *Browning-Ferris*, noted "that the claim of excessiveness under the Due Process Clause of the Fourteenth Amendment had not been raised in either the District Court or the Court of Appeals, and therefore was not to be considered.") *and TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462-463 (1993) ("We decline to address the . . . argument as it was not argued or passed on below.").

proof, Chrysler cites the Sixth Circuit's Opinion, where it stated: "Chrysler also maintains that judgment as a matter of law should have been entered in its favor as to the claim for punitive damages because the jury's award was so excessive as to violate the Due Process Clause. This Court does not agree." Pet. App. 34a. This Court must wonder why the Sixth Circuit would make a *Gore* analysis when the unconstitutionally excessive issue was not raised, briefed or argued in the District or Appellate Court. Res. App. 1a-4a. The answer lies in Chrysler's mastery at phrasing arguments so as to mislead even the most cautious reader.

The best example of Chrysler's skill in misdirection is found in its Petition at 21-22. Chrysler begins by complaining about the vague and inadequate punitive damages jury instruction. Pet. at 21. Chrysler then quotes the punitive damages jury instruction, and advises the Court that it may be found in Volume 3 of the Trial Transcript at page 180. The very next sentence of this paragraph reads: "Over Chrysler's objection, 3 Tr. 136, the District Court even refused to instruct the jury that the fact that the Ram exceeded Federal Safety Standards created a presumption under Kentucky law that the vehicle was *not even defective*." Pet. at 22.

Anyone reading this argument would reasonably, but erroneously, believe that the District Court gave its vague and inadequate punitive damages jury instruction "over Chrysler's objection." In truth, both parties agreed to the language of the punitive damages instruction.[22] R.E. at 63-73, 3 Tr. 12-14.

---

[22] At the close of the evidence, and prior to instructing the jury, the Court inquired if the parties had any objections to the Court's instructions, which primarily consisted of the Agreed Instructions R.E. 63-72.

(Continued on following page)

Not only did Chrysler fail to advise this Court that it did not preserve the unconstitutionally excessive argument for review, or that it agreed to the language of the punitive damages instruction, Chrysler attempts to misdirect and deceive the Court on these important issues.[23] Chrysler's Petition for a Writ of Certiorari should be denied on these grounds.

B. The $3 Million Punitive Damages Award Is Not Unconstitutionally Excessive

The door latch system on the 1991-1994 Dodge Ram pickup was akin to affixing a dead-bolt lock to a piece of flimsy cardboard. The jury saw that all other contemporaneous pickup trucks had boxed and supported B-pillars, as opposed to Chrysler's use of a single pane of unsupported sheet metal. Plf. Ex. 29.

The jury heard from Mr. Billy Peterson, an automotive engineer with 25 years of experience – over half of those years spent working for the National Highway Traffic Safety Administration's Research & Development Group. Mr. Peterson testified that in all his years in the automobile safety field, he had never seen another passenger vehicle with a B-pillar merely consisting of a single pane of sheet metal like the Dodge Ram truck. 2 Tr. 148, 165.

Chrysler reiterated that it disputed plaintiff's entitlement to a punitive damages instruction, but agreed to the language of the instruction. 3 Tr. 13. Fed. R. Civ. Proc. 59 provides: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

[23] Sup. Ct. R. 14.4 states: "The failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to an adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Chrysler fails the accuracy and clarity requirements.

Chrysler's witnesses did not dispute this testimony. The jury heard Chrysler's Vehicle Safety Specialist admit that an unboxed section of sheet metal could not even be considered a pillar, and would be "weak in most every direction." 2 Tr. 94.

The jury heard and saw how a moderate accident (15 mph change in velocity) where the impacting vehicle struck the left front fender of the Clark vehicle – nowhere near the door latch – caused Mr. Clark to be thrown against the door panel, the B-pillar to twist out, the door latch striker to by-pass the latch mechanism, and the door to open. 1 Tr. 94, 101, Plf. Ex. 27. Evidence showed that an occupant's risk of death increases by as much as 4,000% if ejected from the vehicle. 1 Tr. 124.

Evidence of Chrysler's gross negligence and reckless disregard for the occupants of its Dodge Ram trucks was overwhelming. Mr. Clark paid the ultimate price for Chrysler's gross negligence. Even though Mr. Clark owned his own construction company, grossing over $250,000 per year and netting over $60,000 per year, Plf. Ex. 3, and was only 59 years old, the jury awarded his estate a modest $250,000 (before reduction for comparative negligence) for the destruction of his earning power.[24] Total compensatory damages, including medical expenses, pain and suffering preceding death, burial expense and loss of spousal consortium, were assessed at $471,258.26. This amount was reduced by half due to the jury's finding that Mr. Clark was fifty percent at fault for the accident.[25]

---

[24] The measure of damages for wrongful death in Kentucky is limited to burial expense and the destruction of the decedent's power to earn money. *Adams v. Davis*, 578 S.W.2d 899 (Ky. 1979).

[25] It is not known whether the jury found Charles Clark at fault for pulling into the path of an oncoming car or for failing to wear his seatbelt, or both.

Even if Chrysler had preserved this issue for review, Clark is confident that this Court, as well as the Court of Appeals and District Court, would have found that the $3 million punitive damages award was not unconstitutionally excessive. A brief review of the recent opinions of this Court dealing with the constitutionality of punitive damages follows.

(1) *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71 (1988). This was a first-party insurance bad faith claim. Bankers Life refused to pay the $20,000 benefit due for the loss of a leg. A Mississippi jury awarded Crenshaw $20,000 in actual damages and $1.6 million in punitive damages, a ratio of 80 to 1. The Mississippi Supreme Court affirmed, and a 15% appeal penalty was assessed against Bankers Life. This Court found the 15% appeal penalty was not unconstitutional, *id.,* at 85, but refused to consider Bankers Life's claim that the size of the punitive damages award violated the Due Process Clause, as this claim was "not raised and passed upon in State Court." *Id.,* at 76.

(2) *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989). This was a business tort claim by one waste disposal company (Kelco) against another (BFI). The jury awarded Kelco $51,146 in compensatory damages for lost profits and $6 million in punitive damages, a ratio of 117 to 1. This Court rejected BFI's claim that the Excessive Fines Clause of the Eighth Amendment applied to punitive damages awards in cases between private parties. *Id.,* at 259. BFI also requested a review of the punitive damages award to determine whether it was excessive under the Due Process Clause of the Fourteenth Amendment, but the Court refused to consider this argument as it had not been raised below and was not preserved for review. *Id.,* at 276-277. The Court affirmed the punitive damages award.

(3) *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1 (1991). This case involved an insurance agent who fraudulently pocketed the premiums for a group health

insurance policy, which resulted in Ms. Haslip having medical expenses not covered by insurance and being subjected to collection attempts on her unpaid medical bills. The jury awarded a general verdict of $1,040,000. The Court stated that the punitive damages award was more than four times the amount of compensatory damages, and more than 200 times Haslip's out-of-pocket expenses. *Id.,* at 23. Pacific Mutual's claim that the punitive damages award violated the Due Process Clause of the Fourteenth Amendment was properly preserved. This Court stated that punitive damages could be so excessive as to be unacceptable under the Due Process Clause, but the damages awarded here did not "cross the line into the area of constitutional impropriety." *Id.,* at 23.

(4) *TXO Production Corp. v. Alliance Resources Corp.,* 509 U.S. 443 (1993). This case involved a commercial dispute between oil companies. Alliance was awarded $19,000 in actual damages (the cost of defending a declaratory judgment action brought by TXO) and $10 million in punitive damages, a ratio of over 526 to 1. The issue before the Court was whether the punitive damages award was so "grossly excessive" as to violate the Due Process Clause of the Fourteenth Amendment. *Id.,* at 458. The Court noted that: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.,* at 458 (quoting from *Haslip*). The Court affirmed the punitive damages award.

(5) *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996). Dr. Gore bought a new BMW automobile, and later discovered that a portion of the vehicle had been repainted after leaving the factory. Dr. Gore sued for fraud (suppression of a material fact). The jury awarded $4,000 in compensatory and $4 million in punitive damages (1,000 to 1 ratio), which the Alabama Supreme Court remitted to $2 million (500 to 1 ratio). *Id.,* at 565-567. This Court found the $2 million punitive damage award to be grossly

excessive, thus violative of the Due Process Clause of the Fourteenth Amendment. The Court established three guideposts for determining whether a punitive damages award is grossly excessive: the degree of reprehensibility, ratio of punitive damages to the actual harm inflicted on the plaintiff and sanctions for comparable misconduct. The Court again stated: "Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award." *Id.,* at 582.

(6) *Cooper Industries v. Leatherman Tool Group,* 532 U.S. 424 (2001). This case involved one tool manufacturing company suing another for unfair competition. A jury awarded Leatherman Tool Group $50,000 in compensatory damages and $4.5 million in punitive damages, a 90 to 1 ratio. *Id.,* at 426-427. The District Court refused to set aside the punitive damages award as being grossly excessive and the U.S. Court of Appeals for the Ninth Circuit affirmed, stating that the District Court did not abuse its discretion in declining to reduce the punitive damage award. *Id.,* at 430-431. This Court held that Courts of Appeals should apply a *de novo* standard when reviewing District Court determinations of the constitutionality of punitive damage awards, and remanded the case. *Id.,* at 436. This Court noted that: "If no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination under an abuse-of-discretion standard." *Id.,* at 433 (internal quotations omitted). This Court again "recognized that the relevant constitutional line is inherently imprecise . . . rather than one marked by a simple mathematical formula." *Id.,* at 434-435 (internal quotation marks and citations omitted).

(7) *State Farm Mut. Automobile Ins. Co. v. Campbell,* 123 S.Ct. 1513 (2003). This case involved an automobile insurance company's failure to promptly settle claims for its insured's $50,000 liability limits. In the underlying

automobile accident case, a Utah jury assessed the plaintiffs' damages at $185,849. *Id.*, at 1518. In the subsequent insurance bad-faith case, the jury awarded $2.6 million in compensatory damages and $145 million in punitive damages (56 to 1 ratio). *Id.*, at 1519. The trial court reduced the verdict to $1 million for compensatory damages and $25 million for punitive damages (25 to 1 ratio). *Ibid.* The Utah Supreme Court reinstated the $145 million punitive damages award (145 to 1 ratio). *Ibid.* Applying the *Gore* guideposts, this Court found it was error to reinstate the $145 million punitive damages award. *Id.*, at 1521. The Court again recognized that it has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," *id.*, at 1524, but finding "this case is neither close nor difficult," *id.*, at 1521, reversed. While again declining "to impose a bright line ratio which a punitive damage award cannot exceed," *id.*, at 1524, the Court stated that: "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Ibid.* (*Campbell* also involved a state jury awarding punitive damages for conduct that occurred in a different state, which is not an issue here.)

Clark respectfully submits that the punitive damages verdict in this case does not exceed a single digit ratio to a significant degree, if at all,[26] and that this award does not violate due process. The modest punitive damages award in this case does not "jar one's constitutional sensibilities" or indicate punitive damages that "run wild." *Pacific Mutual Life Insurance Co. v. Haslip, id.*, at 18. The $3 million award surely did not jar Chrysler's sensibilities, as

---

[26] If one compares the total compensatory damage award of $471,258.26 to the $3 million punitive damages award, this is a 6 to 1 ratio. If one compares the compensatory damage award after being reduced for comparative fault ($235,629.13), this is a 13 to 1 ratio.

evidenced by its failure to raise an excessiveness claim in the District Court.

Chrysler attempts to lump this case with *Ford Motor Co. v. Romo,* No. 02-1097 (GVR issued May 19, 2003) and *Ford Motor Co. v. Smith*, No. 02-1096 (GVR issued May 19, 2003). Although all three cases involve death from a defective motor vehicle, that is where the similarity ends: *Clark* was tried in Federal Court, *Romo* and *Smith* were tried in state courts; *Clark* involved a defective vehicle less than 2 years old, *Romo* involved a 15 year old vehicle and *Smith* a vehicle "more than 16 years old"; *Clark* involved modest compensatory damages of $471,258 reduced to $235,629, while compensatory damages in *Romo* were $6.2 million for three deaths and three injury claims, and $3 million in *Smith* for one death; *Clark* involved punitive damages of $3 million, while punitive damages in *Romo* were $290 million, and punitive damages in *Smith* were $20 million, reduced to $15 million on appeal; *Clark* did not involve testimony or argument suggesting that Chrysler should be punished for conduct occurring in other States, which appears to be Ford's primary arguments in *Romo* and *Smith;* and, Chrysler agreed to the language of the punitive damages jury instruction in *Clark*, while Ford claims its jury instructions in *Romo* and *Smith* were rejected by the trial court.[27] Finally, Ford paid the compensatory damages verdicts in *Romo* and *Smith* (presumably because of the 10% per annum post-judgment interest rate in California[28] and the 12% per annum post-judgment interest rate in Kentucky[29]), while Chrysler has not paid

---

[27] *See* Petitions for Writ of Certiorari in *Ford Motor Co. v. Romo,* No. 02-1097, and *Ford Motor Co. v. Smith,* No. 02-1096.

[28] Cal. Code Civ. P. §685.010(a)

[29] KRS §360.040

compensatory damages to Mrs. Clark, even though compensatory damages are not even being contested (presumably because of the low post-judgment interest rates in Federal Court, from 5.48% for the year beginning October 2, 1997 to 1.73% for the year beginning October 2, 2002.[30]

In addition to the excessiveness claim not being preserved for review, the $3 million punitive damages award is not so grossly excessive so as to violate due process standards. Granting certiorari here will not add to this Court's long line of cases regarding constitutional limitations on punitive damages awards. This Court's recent decision in *State Farm v. Campbell* does not justify GVR, especially where the unconstitutionally excessive claim was not raised, briefed or argued before the District Court or the Sixth Circuit Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD HAY
203 West Columbia Street
P.O. Box 1124
Somerset, KY 42502-1124
(606) 679-2214

Counsel for Respondent

July 1, 2003.

[30] The federal post-judgment interest rates are available at www.federalreserve.gov/releases/H15/data/WF/tem1y.txt.

APPENDIX A

Arguments raised by Chrysler in its motion to the District Court for a new trial:

A. DEFENDANT WAS INCURABLY PREJUDICED BY THE SURPRISE TESTIMONY OF ANDREW GILBERG.

B. THE JURY VERDICT WAS BASED IN PART UPON THE INADMISSIBLE EVIDENCE, BY ANDREW GILBERG, REGARDING FOUR LATCH FAILURES IN THE PAST.

Chrysler's motion for a new trial, R.E. 151.

APPENDIX B

Argument raised by Chrysler in its renewed motion to the District Court for judgment as a matter of law:

A. THE PLAINTIFF PRESENTED NO EVIDENCE THAT AN ALLEGED DEFECT IN CHRYSLER'S LATCH ENHANCED OR EXASPERATED [sic] THE INJURIES THAT THE PLAINTIFF WOULD HAVE SUFFERED WITH A NON-DEFECTIVE LATCH

B. THE PLAINTIFF FAILED TO ESTABLISH THE CAUSE OF PLAINTIFF'S DEATH

C. THERE WAS ABSOLUTELY NO EVIDENCE TO SUPPORT A PUNITIVE DAMAGES INSTRUCTION

   1. There is absolutely no evidence of "gross negligence" with respect to the Chrysler "K-latch" which warranted a punitive damages instruction

   2. There is absolutely no evidence of "gross negligence" with respect to the Chrysler "B-Pillar" which warrants a punitive damages instruction

Chrysler's renewed motion for judgment as a matter of law, R.E. 152.

APPENDIX C

Arguments raised by Chrysler in its Appellant's Brief to the Sixth Circuit:

I. PLAINTIFF FAILED TO INTRODUCE LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDINGS OF CAUSATION AND PUNITIVE DAMAGES

   A. Plaintiff Failed To Introduce Legally Sufficient Evidence of Causation

      1. Plaintiff Introduced No Proof That Any Of The Proposed Alternative Designs Would Have Prevented Mr. Clark's Death

      2. Plaintiff Failed To Prove That, Absent The Alleged Defect, Mr. Clark Would Have Survived The Accident

   B. Plaintiff Failed To Introduce Legally Sufficient Evidence Warranting Punitive Damages

II. PLAINTIFF'S EXPERT WITNESSES SHOULD HAVE BEEN FORBIDDEN FROM TESTIFYING UNDER RULE 702

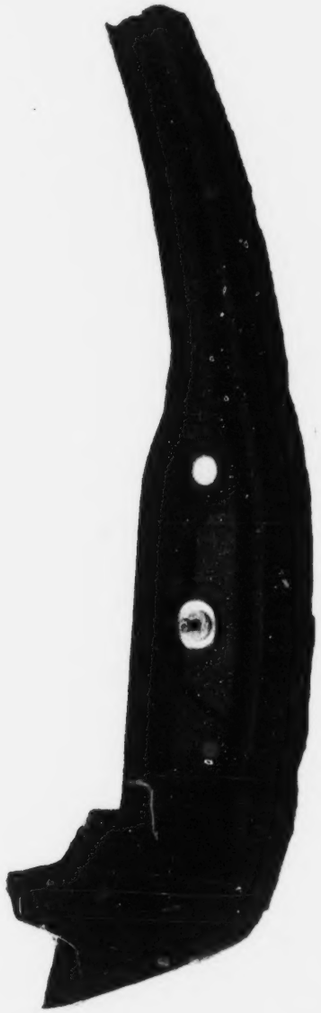
III. THE DISTRICT COURT ERRONEOUSLY REFUSED TO INSTRUCT THE JURY THAT CHRYSLER'S COMPLIANCE WITH THE GOVERNING FEDERAL SAFETY STANDARDS CREATED A PRESUMPTION THAT THE RAM TRUCK WAS NOT DEFECTIVE

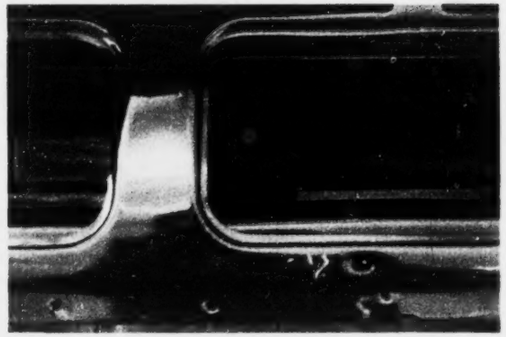
IV. THE DISTRICT COURT ERRONEOUSLY PERMITTED TESTIMONY REGARDING OTHER ALLEGED INCIDENTS EVEN THOUGH PLAINTIFF FAILED TO SHOW "SUBSTANTIAL SIMILARITY" BETWEEN THOSE INCIDENTS AND THE COLLISION HERE

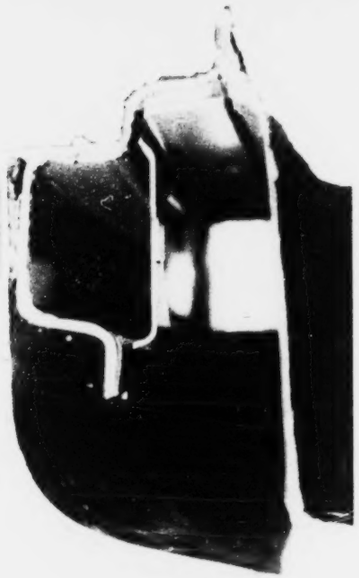
Final Brief of Appellant Chrysler Corporation, U.S. Court of Appeals for the Sixth Circuit, May 18, 1999.

APPENDIX D

Photos of Exemplar (GM) B-pillar







APPENDIX E

Photos of Clark Vehicle